Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of: Implementation of Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992 Horizontal and Vertical Ownership Limits, Cross-Ownership Limitations and Anti-Trafficking Provisions	MM Docket No. 92-264

To: The Commission

REPLY COMMENTS OF VIACOM INTERNATIONAL INC.

VIACOM INTERNATIONAL INC.

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SUMMARY

Viacom International Inc. ("Viacom") hereby replies to the comments submitted in response to the Notice of Proposed Rule Making relating to Sections 11 and 13 of the Cable Television Consumer Protection and Competition Act of 1992.

Viacom agrees with those commenters who urge the Commission to interpret its waiver authority and the statutory exceptions to the three-year holding period requirement imposed by Section 617 in the broadest manner possible, consistent with the goals of the provision. Specifically, the exception for transfers not subject to federal income tax liability should apply to any non-recognition transaction described in the Internal Revenue Code. Moreover, the availability of the exception should not be limited to only transactions which result in complete deferral of federal income tax liability. Additionally, the Commission must enforce the anti-trafficking provision in order to ensure nationwide uniformity in its application.

With regard to the MMDS and SMATV cross-ownership prohibition, Viacom agrees with the National Cable Television Association and the National Private Cable Association that the provision only prohibits a cable operator from providing a service within its franchise area that is not offered in accordance with its franchise agreement. Additionally, the prohibition only restricts the activities of the cable operator within those portions of the franchise area actually served by the cable system.

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Viacom International Inc. ("Viacom"), by its attorneys, hereby submits its reply comments in the above-referenced proceeding. Pursuant to the Commission's Order, DA 93-233 (rel. Feb. 26, 1993), these reply comments are limited to issues pertaining to (i) Sales of Cable Systems; and (ii) the MMDS and SMATV Cross-ownership Prohibition. Viacom's comments regarding Subscriber Limits, Channel Occupancy Limits and Participation in Program Production will be filed on or before the extended deadline.[1]

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[1] Although the Order is not explicit in this regard, undersigned counsel has been advised by Commission staff that reply comments regarding Participation in Program Production are included in the extension.

I. Sales of Cable Systems

A. The Commission's Waiver Authority and the Statutory Exceptions Should Be Interpreted Broadly

Several parties offered comment on the proper interpretation and scope of the exceptions to the three-year holding period contained in Section 617(c). See, e.g., Comments of Cole, Raywid & Braverman at 9-17; Comments of InterMedia Partners at 5; Comments of Corporate Partners at 11; Comments of Sandler Capital Management ("Sandler") at 12. Viacom agrees with these commenters that the exceptions should be read broadly to include transactions that do not cause the harms sought to be prevented by the anti-trafficking provision.

As the Commission notes, the three-year holding period was imposed in order to prevent "profiteering transactions and other transfers that could affect cable television rates or service." Notice of Proposed Rule Making and Notice of Inquiry in MM Docket No. 92-264, FCC 92-542 (rel. Dec. 28, 1992) ("NPRM") at ¶9 (citing House Committee on Energy and Commerce, H.R. Rep. No. 102-628, 102d Cong., 2d Sess. (1992) ("House Report") at 119). Recognizing that not all sales or transfers will have this result, Congress enacted three specific exceptions to the restriction and gave the Commission broad authority to waive the provision if it found the waiver to be in the public interest. See 47 U.S.C. § 537(c), (d).

Viacom agrees that the Commission should apply the exceptions and its waiver authority in the broadest manner possible consistent with the goals of the provision. Thus, for example, the Commission should grant a waiver in any situation in which the cable operator is able to demonstrate that a sale within the three-year holding period will not have an adverse effect on rates or services (e.g., transfers that will not substantially increase debt service or otherwise adversely affect cash available for operations).[2]

Similarly, the exception for transfers "not subject to federal income tax liability," 47 U.S.C. § 537(c)(1), should apply to "any non-recognition transaction described in the Internal Revenue Code . . .." See Comments of Sandler at 14. As the Commission properly notes, the defining characteristic of a transaction which would qualify for this exception is a transaction that "essentially allow[s] deferral of income recognition." NPRM at ¶ 15. The NPRM goes on to find that "[t]hese transactions are not subject to current tax liability and are consistent with the objectives of the anti-trafficking provision." Id. In addition to those transactions specifically recognized in the NPRM (such as Section 1071 transactions, like-kind exchanges and corporate reorganizations), other transactions to which the three-year holding period should not apply include

[2] The Commission, in making this determination, should consider the effect of other statutory provisions and regulations which control rates and customer service.

the exercise of warrants or options to purchase corporate stock and the conversion of convertible stock or debentures. The exception should be equally available to those non-recognition transactions. Additionally, the exception should be applicable without regard to whether the purchaser is a corporation or partnership. Thus, the exception should extend to partnership transactions described in Sections 721 and 731 of the Internal Revenue Code ("IRC").

Moreover, availability of the "tax-deferral" exception should not be limited to those transactions which result in complete deferral of federal income tax liability. To do so would effectively foreclose its use. For example, income tax liability will arise in most minority tax certificate transactions pursuant to IRC § 1071 because the depreciation recapture provisions of IRC §§ 1245 and 1250 override the non-recognition provisions of IRC §§ 1071 and 1033. Similarly, as other commenters point out, many non-recognition transactions are partially taxable to the extent that boot is received. Boot (i.e., cash or other taxable consideration received in an otherwise tax-free exchange) is often needed to equalize the value of the consideration being exchanged by the parties to a given transaction. Further, as noted by Corporate Partners, it is virtually impossible to have a like-kind exchange without some tax liability because of recent amendments to the tax regulations. Comments of Corporate Partners at 15. Thus, allowing the exception only in instances in which there is no current tax liability would severely restrict availability of the exception, even though the particular type of transaction could not possibly result in the harms addressed by the provision and is otherwise generally to be encouraged.

In addition to transfers that essentially allow deferral of taxable income recognition, there are many types of transfers that are not subject to Federal income tax liability at all. One class of such transfers includes transfers by gift or under applicable estate and inheritance laws (whether such transfers are direct or through a trust or similar vehicle and whether such transfers are testate or intestate). A second class would include certain transactions of a corporation in its own stock, such as the issuance of new stock for cash or property (whether or not pursuant to a public offering), the issuance of options or warrants to purchase the corporation's stock and the issuance of convertible preferred stock or convertible debentures. These types of transfers fall squarely within the statutory exception and thus must be excluded from the three-year holding period requirement.

Finally, Section 617(b) permits a subsequent sale within the holding period of one or more cable systems acquired in a group if the subsequent sale was required by the terms of the buyer's initial acquisition. 47 U.S.C. § 537(b). Several commenters urge the Commission to recognize that the "terms of sale" should include more than situations in which there is an express statement in the initial purchase agreement that the buyer will "spin-off" one or more specific properties being acquired to an identified third party. See, e.g., Comments of Time Warner Entertainment Company, L.P. at 18. Viacom agrees that this provision should be read broadly so that the parties to the initial sale are not required to "specify the number or identity" of either the system(s) to be subsequently transferred or the third party transferee. Id. Rather, it should be sufficient that the parties to the initial sale either state a bona fide current intention to engage in subsequent transfers within a reasonable period of time (e.g., 12 months) from consummation of the initial transaction or obtain any applicable approvals from franchising authorities for subsequent dispositions at the time that approval is obtained for the initial transfer.

B. To Ensure Nationwide Uniformity, the Commission Must Be the Sole Authority for Interpreting and Enforcing the Anti-Trafficking Provision

Several franchising authorities urge the Commission to adhere to its preliminary determination that local franchise authorities should monitor and enforce compliance with the anti-trafficking restriction. See, e.g., Comments of the National Association of Telecommunications Officers and Advisors, et al.

("NATOA"), at 41-42;[3] Comments of the New Jersey Office of Cable Television at 1. As set forth in the comments of numerous parties, however, local enforcement of the anti-trafficking restriction will lead to anomalous results. See, e.g., Comments of Tele-Communications, Inc. at 44; Comments of Time Warner Entertainment Company, L.P. at 37. For example, if local franchise authorities are given enforcement responsibility, an MSO seeking to sell two similarly situated systems as part of the same transaction could find that one franchise authority determined that the sale fell within a statutory exception while the other franchise authority determined that it did not. In order to ensure nationwide uniformity in the application of this federally-established requirement, therefore, the Commission must be the sole entity responsible for interpreting and enforcing the anti-trafficking provision.[4]

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[3] NATOA also claims that the three-year holding period should not apply to municipally-owned systems. Comments of NATOA at 13. Viacom submits that there is no statutory support for such an exception. Moreover, since the sale of a municipally-owned system could have an effect on rates and customer service that would be indistinguishable from the potential effect of a sale of a privately-owned system, such an exemption would prevent the statute from having its intended effect.

[4] This does not necessarily mean that the local franchise authority should have no role in monitoring compliance with the provision. Any disagreements between a franchise authority and a cable operator, however, must be settled by the Commission. See Comments of New York State Commission on Cable Television at 8.

II. MMDS and SMATV Cross-ownership Prohibition

The scope and interpretation of the SMATV/cable cross-ownership restriction contained in Section 613(a)(2) was also the subject of comments by several parties. Significantly, the National Cable Television Association ("NCTA"), the trade association for cable operators, and the National Private Cable Association ("NPCA"), the trade association for SMATV system operators, are in agreement as to the proper interpretation of the SMATV restriction.

Section 613(a)(2) states that "[i]t shall be unlawful for a cable operator to . . . offer satellite master antenna television service separate and apart from any franchised cable service, in any portion of the franchise area served by that cable operator's cable system." 47 USC § 533(a)(2). NCTA and NPCA both focus on the phrases "separate and apart" and "served by" as being the keys to the proper understanding of the prohibition. See Comments of NCTA at 57-61; Comments of NPCA at 8-14.

Essentially, NCTA and NPCA demonstrate that the phrase "separate and apart from any franchised cable service" is intended to allow a cable operator to operate a SMATV system within its franchise area as long as the SMATV system is "operated in accordance with, and subject to the terms of, the cable operator's franchise . . . ." Comments of NCTA at 59. Thus, there is no need for a cable system to physically interconnect a portion of the system that resembles a SMATV operation[5] with the rest of the cable system as long as service to that portion of the system is being provided in accordance with the franchise. Viacom supports this interpretation of the statute which, as demonstrated below, will serve the public interest by allowing cable operators to build out their franchise areas in the most cost-effective manner.

By virtue of its franchise, a cable operator is authorized to use public rights of way in order to provide cable service to a particular franchise area. The cable operator generally has discretion to determine the most economically efficient manner in which to provide that service to consumers.[6] For the Commission to impose requirements that all portions of the system be physically interconnected with the cable system in order to comply with the SMATV cross-ownership restriction, however, would artificially limit the ability of the operator to provide service to consumers in the most cost-efficient manner without providing any countervailing benefits to consumers. For example, a particular apartment complex may be sufficiently large and

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[5] As indicated in the Comments of NCTA, the Communications Act does not expressly define a SMATV system. Comments of NCTA at 59, n.114. Viacom agrees, however, that any definition must flow from Section 602(6)(B) of the Act -- the so-called "SMATV exception" to the definition of a cable system. Thus, for example, the cross-ownership restriction would not prohibit a cable operator from providing service to a group of private dwelling units (as distinguished from multiple unit dwellings) located entirely on private property through a separate head-end that does not cross a public right-of-way.

[6] For example, a particular operator may use two or more head-ends in order to build out its franchise area.

separated from the rest of the cable system that the cable operator determines it best to serve that complex from its own head-end. If the complex does not cross a public right-of-way, however, the system could be classified as a SMATV operation. Under an overly restrictive reading of the statute, the cable operator might be forced to cross a public right-of-way merely to provide that service in compliance with the cross-ownership restriction. Or, worse, the cable operator might be discouraged from building out its system to serve additional areas -- a result that runs counter to the public interest and the objectives of the statute.[7]

Accordingly, the more rational interpretation -- as well as the one most consistent with the language of the statute -- is that the cable operator should be considered in compliance with the statute as long as the operator provides service in accordance with the franchise agreement. In such a situation, the operator is providing a service that is not "separate and apart" from the franchised cable service.

NPCA and NCTA also demonstrate that the phrase "portion of the franchise area served by [the] cable operator's cable system" limits the scope of the cross-ownership prohibition to areas within the franchise area that are actually passed by the cable

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[7] See, e.g., Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460, § 2(b).

system.[8] See Comments of NPCA at 8. As NCTA and NPCA correctly point out, had the prohibition been designed to limit SMATV or MMDS operation by cable operators throughout their franchise areas, the provision would not have included the phrase "served by that cable operator's cable system," but would have ended after the words "franchise area." Because all of the words of a statutory provision must be given their effect,[9] however, the cross-ownership prohibition contained in Section 613(a)(2) should be read as applying only in that portion of the franchise area "served by [the] cable operator's cable system." Therefore, even if service is not being provided in accordance with the franchise agreement, the cross-ownership provision does not prohibit a cable operator from offering service in portions of the franchise area not otherwise served by the cable operator.[10]

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[8] As noted by NCTA, the language of the statute applies equally to MMDS and SMATV facilities. Comments of NCTA at 60, n.116. Because an MMDS system provides service in a different manner than a SMATV system, however, an MMDS system is unlikely to be exempted from the cross-ownership prohibition by virtue of this language. Id.

[9] See, e.g., 2A N. Singer, Sutherland Statutory Construction, § 46.06 (5th Ed. 1992).

[10] In any event, Viacom submits that waivers should liberally be granted to cable operators who determine that the most cost-effective means of expanding service throughout the franchise area includes utilization of "SMATV" facilities. See Comments of Viacom at 24.

III. Conclusion

For the foregoing reasons, Viacom submits that the Commission should adopt the interpretations of the statute set forth herein.

Respectfully submitted,

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